

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4049

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UNITED STATES COURT OF APPEALS
FOR THE SECOND DISTRICT

GENERAL DYNAMICS CORPORATION, ELECTRIC BOAT DIVISION,

Petitioner

AGAINST

BENEFITS REVIEW BOARD; DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAM; UNITED STATES DEPARTMENT OF
LABOR; SAMMIE L. GRAY; AND INSURANCE COMPANY OF
NORTH AMERICA,

Respondents

APPEAL FROM THE BENEFITS REVIEW BOARD

RESPONDENT-CLAIMANT'S BRIEF

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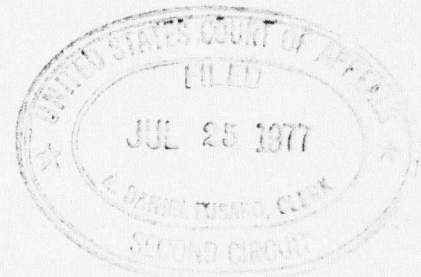


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225 F.2d 137 (2nd Cir. 1955)
cert. den. 350 U.S. 913

Statutes:

Longshoremen's and Harbor Worker's
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STATEMENT OF FACTS

Sammie L. Gray was employed as a pipelagger at Electric Boat Division of General Dynamics from 1962 to September 27, 1973. During most of this time he worked installing and removing asbestos insulation on board submarines. (127-131a) He was laid off in 1967 and returned in 1970. (128a) When he returned in 1970 he returned to his original job as a pipelagger performing the same type of work until September 27, 1973. (138a)

In August, 1972 the claimant had difficulty breathing and pain on his left side. This was diagnosed as "probably pleuritis." (61a) The claimant had a chest x-ray on September 19, 1972 by the employer which revealed some pleural scarring but did "not appear to be of immediate clinical significance." (60a)

On March 20, 1973 the claimant reported to the local hospital that he was having pains in the chest and stomach and also had "sore throat, neck, chills, fever,

anorexia, nausea." There was no diagnosis at that time and the question of "strep" was raised on the outpatient record of the hospital. (62a) On March 28, 1973 the claimant was unable to work while taking medication and had stomach pain for which he was given outpatient treatment at the hospital again. The diagnosis was urinary tract infection and problems related to his teeth.

The pleural scarring in 1972 indicated asbestos exposure but it was of no consequence to the health of the claimant nor did it indicate any significant disease. (23a) The symptoms of asbestosis beginning in September, 1972 were thought by Dr. Gaensler to be early symptoms of the subsequent development of asbestosis. (26a) The manifestations of asbestosis and pleural effusion were undoubtedly the result of exposure that occurred 5 to 7 years earlier. (29a) A pain in the chest could be the result of innumerable causes. (33a) When his chest was opened and examined in 1973 it showed marked fibrosis. (95a) Only after this surgical procedure was taken was the firm diagnosis of asbestosis made. (95a) The surgery was performed to attempt to find the cause of the pleural reaction. (95a) The

surgery itself was a large contributor to the claimant's disability. (34a)

The Insurance Company of North America was the workmen's compensation insurance carrier for Electric Boat Division of General Dynamics until April 1, 1973 when General Dynamics became a self-insurer.

The claimant has been permanently and totally disabled since September 27, 1973. At a formal hearing held before an Administrative Law Judge on September 11, 1975 the employer finally agreed to pay compensation to Mr. Gray "subject to reimbursement between the parties here." (122-2a)

In its brief the employer, General Dynamics, has decided to no longer contest the issue of whether the claimant's total disability is permanent or whether the average weekly wage was calculated properly including overtime earnings.

ISSUES

- I. AT WHAT POINT CAN IT BE SAID WITH REASONABLE CERTAINTY THAT THE CLAIMANT WAS SUFFERING FROM THE DISEASE OF ASBESTOSIS.
- II. IS THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT THE PROPER FORUM IN WHICH TO DETERMINE WHO SHOULD BE THE RESPONSIBLE INSURANCE CARRIER.
- III. ASSUMING THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT IS THE PROPER FORUM TO DETERMINE THE RESPONSIBLE INSURANCE CARRIER WHICH CARRIER SHOULD BE HELD RESPONSIBLE.

I. AT WHAT POINT CAN IT BE SAID WITH REASONABLE CERTAINTY THAT THE CLAIMANT WAS SUFFERING FROM THE DISEASE OF ASBESTOSIS.

The first time the diagnosis of asbestosis appears in the medical records is during the October 9, 1973 hospital admission. (71a) At that time a tentative diagnosis of pleurisy possibly related to previous exposure to pulmonary asbestos was made. The diagnosis was not made certain until January 30, 1974. (92a)

Prior medical findings were suggestive of but not diagnostic of asbestosis. These previous findings include pleuritis, in August, 1972 (61a) and pleural scarring, not of immediate clinical significance, in September, 1972 (60a). It might be said that asbestosis begins on the first day of exposure and inhalation of asbestos fibers into the lungs, when the asbestos fiber begins scarring the lung tissue. If that view were adopted in this case, then exposure of the claimant after April 1, 1973 must be regarded as causing new injuries daily and would be contrary to the theory urged by the petitioner.

The logical point in time when one can be said to be suffering from the disease of asbestosis should be when sufficient medical evidence is available to arrive at a medical diagnosis. Although isolated symptoms may appear during the course of development of the disease, some of which may be suggestive of the ultimate disease, until sufficient symptoms appear to make the diagnosis one can hardly be said to be suffering from the disease. In the case at bar, the date would logically be after the hospital admission of October 9, 1973.

II. IS THE LONGSHOREMEN AND HARBOR WORKER'S COMPENSATION ACT THE PROPER FORUM IN WHICH TO DETERMINE WHO SHOULD BE THE RESPONSIBLE INSURANCE CARRIER.

There is nothing in the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. 901 et. seq. requiring administrators of the Act to determine who among successive employers or insurance carriers should be held responsible for any given industrial accident or disease. It is apparent that the Act could not be reasonably administered without determining responsible

employers as among successive employers. The same reasoning does not apply as to successive insurance carriers, as the responsibility clearly lies with the employer in the first instance. How the employer chooses to insure its risks under the Act is clearly up to each employer. In no way should the courts or the Department of Labor allow innocent industrial victims be prejudiced by controversy as to coverage between insurance carriers, be they third-party carriers or self-insured employers. The prejudice resulting from this kind of controversy is dramatically illustrated in this case.

The employer maintains that the claimant's condition began in March of 1973 while the claimant and insurance carrier submit the condition was not diagnosed until October, 1973. All parties are in agreement however that as of October, 1973 the claimant was totally disabled from asbestosis arising out of his employment. In spite of the clear medical diagnoses made in October, 1973 and confirmed by January 30, 1974 the claimant was not paid compensation until September, 1975, following the formal hearing on this case. During

a dialogue between the Administrative Law Judge, counsel for the claimant (Mr. Shafner) and counsel for General Dynamics (Mr. Beane) in regard to a proposed deposition following the trial which might delay a final decision and payment of compensation on the claim, the following occurred:

"Judge Giesey: And I would look favorable upon the submission of this document, of this deposition and I would hope that you would agree to it.

"Mr. Shafner: Could we obtain some agreement that Mr. Gray be, perhaps, paid some compensation in the meantime. That belongs in another month -- that deposition.

"Judge Giesey: Well --

* * *

"Mr. Beane: We agree to pay compensation to Mr. Gray subject to reimbursement between the parties here.

"Mr. Shafner: That's not --

"Mr. Beane: I told My Brother this morning that we would do this and I finally agreed to -- I thought he agreed to depose Dr. Gaensler (phonetic).

"Mr. Shafner: When will that begin?

"Mr. Beane: A day or two or a week, whatever it takes to clear the thing and so forth.

"Mr. Shafner: I have no objection to a deposition. (122-2a)

The employer paid no compensation until shortly after the formal hearing in this matter.

The dilemma of the injured employee caught between successive insurance carriers or employers was aptly described by General Dynamics own witness, Dr. Gaensler, at the deposition which subsequently took place. He described a similar problem between Bethlehem Steel and General Dynamics:

"...There are a number of instances of employees who come to us, who are more than truly disabled, they are dying, and it then turns out that if this is a workman's compensation case, Blue Cross, Blue Shield will not pay the bills because there is a little box which says "This is a Workman's Compensation case." (36a)

* * *

"Right. The insurance company then is asked to pay. No one doubts that the man is dying of asbestosis but because he has worked for Bethlehem Steel for twenty years and then he has worked for General Dynamics for ten years

and, in some instances that I know well, for a while the company was self-insured, whatever that is, each one of them says, yes this man is dying, yes, his wife had to put a mortgage on the house, yes, she had to take the kids out of college because she has no more money and is broke but we'll not pay because it all happened while he was insured by the other guy, and then all of these insurance companies get together, and the self-insured, and they fight it out, and that takes three and four and five years, and meanwhile the woman has lost the house, the kids have been taken out of college and the man is dead and under." (37a)

The actual policy of insurance is not part of the record in this case. If offered into evidence it should have been rejected by the Administrative Law Judge. Which insurance carrier should be responsible is a totally collateral matter to entitlement of the claimant to compensation benefits and should be determined in another forum.

III. ASSUMING THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT IS THE PROPER FORUM TO DETERMINE THE RESPONSIBLE INSURANCE CARRIER WHICH CARRIER SHOULD BE HELD RESPONSIBLE.

The petitioner in its brief claims the Administrative Law Judge included the calendar year 1972 in

his wage calculations because he found disability during that year. In fact, the Administrative Law Judge included 1972 only as a full year because it was more representative of the claimant's earning capacity than was 1973. He excluded the year 1973 because of illness in general, and made no finding as to whether the illnesses were related to asbestos exposure. (14a) This was the basis for using Section 10c rather than 10a of the Act to determine the claimant's average weekly wage. (5a) Disability was definitely determined to begin in 1973 where Judge Giesey declined to speculate when the asbestosis might first have been able to be diagnosed:

"However that may be, the evidence clearly demonstrates that he was disabled at the time he ceased employment in September, 1973. I so find." (13a)

If the Court were to adopt the rule urged by General Dynamics that a long retrospective look is appropriate to determine responsible employers or insurance carriers then employers and insurance carriers would be encouraged to sit back and wait for a more favorable diagnosis. As pointed out by Dr. Gaensler,

there are occupational diseases related to asbestos exposure which take 20 to 30 years to manifest themselves sufficiently to result in a diagnosis with a definite causal relationship. It would be to the employer's or carrier's advantage to stall the payment of compensation. The same consideration would apply to disability insurance carriers who exclude workmen's compensation injuries from coverage.

If diagnostic surgery is not performed, the ultimate autopsy record upon death may establish a beneficial retrospective view for the employer. In the meantime, disabled victims of occupational disease and widows would not be paid benefits promptly as intended by Congress through the Act. While the state of medical art has improved in making diagnoses and estimations of time lag exposures, we are still dealing in time periods of 5, 10 and 20 years. The potential number of multiple employers or insurance carriers could be many. There is no way the diseased employee, the intended beneficiary of the Act would benefit from this approach. The administrative result in attempting to determine when asbestosis began for Sammie Gray or any

given employee (with occupational diseases such as lung cancer, silicosis or hearing loss) would be chaotic and counter-productive of the policy expressed by the Congress i.e. the prompt payment of compensation to employees injured in maritime employment. 33 U.S.C. 914(a)

The petitioner claims the insurance carrier did not submit proof as to injurious exposure from May to September of the last year of employment. It is uncontradicted that Mr. Gray continued his employment at General Dynamics in the occupation of pipelagging with the same type of working conditions until September, 1973. (138a)

Between successive employers the last employment in which the claimant was exposed to injurious stimuli before learning that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. Successive insurance carriers are treated in the same manner as successive employers. Travellers vs. Cardillo 225 F. 2d 137 (2nd Cir. 1955) cert. den. 350 U.S. 913. The first question to be decided under Cardillo is when did the

claimant become aware of the fact that he was suffering from an occupational disease arising naturally out of his employment. The earliest medical record is the summary of the hospital admission of October 9, 1973 containing the discharge diagnosis of "probable pulmonary asbestosis." This tentative diagnosis became a certainty on January 30, 1974 (92a). It is reasonable to assume that the claimant's awareness of his disease in relation to his employment did not exist prior to awareness by his treating and examining physician. The earliest date of knowledge would be October 9, 1973. Nothing in the record shows any knowledge before October 9, 1973.

The next question under Cardillo is when was the last injurious stimuli prior to October 9, 1973. It is uncontradicted that the claimant continued working at his regular occupation of pipelagger from May 1, 1973 to September 27, 1973. During this time he testified that his work was the same as before, i.e. using asbestos to cover pipes. (138a) Dr. Gaensler testified on behalf of General Dynamics that any exposure during this period of time did not contribute to his disability when he

examined the claimant on June 18, 1975. Asbestos exposure causing his disability occurred at least 5 years earlier. Dr. Gaensler also admitted, however, that the diagnostic surgery performed in late 1973 was a large contributing factor to his current disability.

All parties would certainly agree that the "stimuli" referred to in this case would be the asbestos fibers or dust to which the claimant had been exposed during his occupation as a pipelagger at General Dynamics. The parties disagree as to what is meant by "injurious". If "injurious" means that which caused disability, then the asbestos exposure between May 1, 1973 and September 27, 1973 could not be classified as "injurious". If, however, "injurious" means that which is capable of producing injury or has the tendency to produce injury without regard to any specific frame of time or actual disability, then the exposure during 1973 and the last few months of employment must be regarded as "injurious". Using Dr. Gaensler's explanation of the five year time lag between exposure and manifestations of symptoms, it would seem reasonable that asbestos exposure on

April 1, 1973 could start to cause additional medical problems beginning in April 1978.

The employer claims that the date when claimant's asbestosis began is not an issue in this case. The date of injury is a consideration nevertheless which cannot be ignored. The date of injury must be determined to consider when disability began and also to determine under the Act the average weekly wage of the employee. The date is also necessary to determine when the claimant became aware of the disease under Cardillo. In this case the date of injury was found to be September 27, 1973 for purposes of disability, (13, 16a) for purposes of Cardillo the date would have to be after October 9, 1973.

General Dynamics as a self-insured employer occupies the role of a successive insurance carrier that Cardillo indicated should be treated in the same manner as a successive employer. Under Cardillo General Dynamics as self-insured employer should clearly be held responsible.

Respectfully submitted,
THE RESPONDENT-CLAIMANT

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ATTORNEYS FOR RESPONDENT-
CLAIMANT

MATTHEW SHAFNER
JULY 22, 1977